IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APOLLO CIVIC THEATRE, INC.

Appellant,

v.

Docket No. 33889
From the Circuit Court of
Berkeley County, West Virginia
Civil Action No. 06-C-528

VIRGIL T. HELTON,
STATE TAX COMMISSIONER OF WEST VIRGINIA,

Appellee.

APPELLANT'S REPLY BRIEF

Respectfully Submitted By

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

ARGUMENT

I. THE APPELLEE CANNOT JUSTIFY THE CIRCUIT COURT'S USE OF HIS INTERPRETIVE REGULATION, PURPORTEDLY ISSUED TO ADDRESS A FUNDAMENTAL AMBIGUITY IN THE GOVERNING STATUTE, BY CONTENDING THAT THE STATUTE IS NOT AMBIGUOUS BUT THAT THE REGULATION'S INTERPRETATION IS "IMPLIED."

At the onset of his Brief, the Appellee argues that "the terms health and fitness are not ambiguous but imply only physical health and fitness . . ." Appellee's Brief, at page 7. (Emphasis added). Thus, Appellee admits that the meaning of the key words of the statute is clear and unambiguous, but then would justify the Circuit Court's erroneous opposite conclusion by presenting a general survey of the rules of statutory construction specifically reserved for use in finding the meaning of unclear and ambiguous laws. The Appellee's argument, all manifested by string citations with little connection to the precise issue presented here, turn on the impossible contention that clear statutes can imply meanings other than what their express words state.

Black's Law Dictionary declares that:

> Implied is used in law in contrast to 'express,' i.e. where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties. [formal cite, 6th Ed. p. 754]

To make his argument – that a clear and unambiguous statute nevertheless implies terms not stated in it – the Appellee must show that the implication he would engraft on the plain words of the statute are a "necessary implication" of those words so strong in their probability that the contrary cannot reasonably be supposed. First National Bank v. De Berriz, 87 W.Va. 477, 105 S.E. 900 (1921). Virtually, without exception, that narrow rule of "necessary implication" is confined to filling in unstated procedural arrangements – not modifying substantive terms. E.g. Hogan v. Piggott, 60 W.Va. 541, 56 S.E. 189 (1906) (holding that " a

tax deed in the form prescribed by the statute is [by necessary implication] prima facie evidence of title to the land thereby conveyed in the grantee thereof . . . "); and State v. McCoy, 91 W.Va. 262, 111 S.E. 125 (1922) (finding that "where a statute allows a judicial proceeding to a man's prejudice, though it does not provide for notice, it is understood to intend it, as no judgment can be given under it without process, and process is necessary").

In all events, a barely possible, merely permissible or conjectural implication, arising from the words of a statute, never justifies its judicial adoption as a substantive part of the statute. First National Bank v. De Berriz, *supra.* Here, one need not look beyond the Appellee's own belief, that he can alternatively plead both the clarity and ambiguity of the subject statute, to demonstrate that the implication he would engraft on it is, at most, conjectural or possible, let alone permissible, and clearly not, in any event, necessary. Thus, the Appellee's contentions about the "implied" meaning of a clear statute does not fail because pleading mutually exclusive positions in the alternative is not generally allowed, but because arguing, that a conjectural implication from a clear statute can limit the meaning of its clear words, is never allowed.

When admitting that the subject statute is unambiguous, the Appellee must concede that the Legislature has clearly spoken to the issue, and accordingly, there is simply no need to engage in statutory construction. See Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 466 S.E. 2d 424 (1995). Rather, with respect to the Sales Tax Assessment in this case, the only legal question to be answered is whether the Appellee's purported construction of the plain language of W. Va. Code § 11-15-11, through his interpretive regulations, at 110 C.S.R. 15(I)4, §3.7, effectively operates to limit the application of the statute to non-profit organizations that promote only physical health and fitness.

The governing statute contains no such limitation and any such argument must be seen as an attempted modification and interpretation of the plain and unambiguous language of the governing statute which would add conditions to such exemption that are outside of its express words. As this Court has held:

> Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same and clear unambiguous force and effect that the language commands in the statute.

CNG Transmission v. Craig, 564 S.E.2d 167, 211 W.Va. 170, syl. pt. 4 (2002) (internal citations omitted). Therefore, any regulation purporting to interpret W. Va. Code. § 11-15-11 must either be read in harmony with or give way to the governing statute and may not add to, subtract from or otherwise alter the statute's terms. Syncor International Corporation v. Commissioner, 208 W.Va. 658, 524 S.E.2d 479, syl. pt. 3 (2001). In fact, when a regulation is "...unduly restricted and in conflict with the legislative intent, the agency's interpretation is inapplicable." Syncor, 208 W. Va. at 662, 542 S.E.2d at 483 (quoting Boley v. Miller, 187 W. Va. 242, 246, 418 S.E.2d 352,356 (1992)).

In CNG Transmission, this Court made clear not only that a legislative regulation is invalid if it does not adhere to the plain language of the statute that governs it, but that such legislative regulation may not be given an "interpretation" by either an administrative agency or a quasi-judicial body that, in effect, alters the plain meaning of an otherwise ambiguous statute. See CNG Transmission v. Craig, 564 S.E.2d at 172, 211 W.Va. at 175 ("In sum, '[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.'"). Id. (quoting Syllabus Point 1, Consumer Advocate Div'n v. Public Service Comm'n, 182 W. Va. 152, 386 S.E.2d 650 (1989).

It is clear that the Appellee makes this implied-from-clear-language argument only to divert from the real issue, to wit: can his regulations modify that clear language of the statute? The answer to that question is incontrovertibly "no."

Because Appellee cannot utilize an interpretive rule to limit the scope of an express statutory exemption under W. Va. Code § 11-15-11, Appellant is entitled to the benefit of that exemption and the Circuit Court's Order clearly erred in holding otherwise.

II. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN UPHOLDING THE ADMINISTRATIVE DECISION'S LEGAL CONCLUSION THAT THE LEGISLATURE'S USE OF THE TERMS "HEALTH AND FITNESS" IN THE GOVERNING STATUTE WAS AMBIGUOUS BECAUSE IT WAS SILENT AS TO WHETHER THOSE TERMS WERE LIMITED TO *PHYSICAL* HEALTH AND FITNESS.

Arguing in the alternative, Appellee next posits that the subject statute is, in fact, ambiguous, but he takes issue with the definitions of the terms "health" and "fitness" cited in the Appellant's Initial Brief. Specifically, Appellee argues, in effect, that there is no common and accepted meaning of the terms "health and fitness," thus justifying the legislative regulations that would limit those terms to *physical* health and fitness.

Appellee bases this argument, in part, on his assertion that Appellent relied upon definitions contained by the World Health Organization and Webster's Medical Dictionary rather than a "dictionary of general distribution." Appellee's Brief, at page 11. Appellee cites no West Virginia authority to support this proposition. Indeed, Appellant cited in its Initial Brief before this Court not only the American Heritage Dictionary (also quoted by Appellee) but also Black's Law Dictionary, which has been held many times by this Court to be a useful authority in construing the ordinary and common meaning of words. See e.g., CNG Transmission v. Craig, 564 S.E.2d 167 172, 211 W.Va. 170, 175 (2002) (utilizing Black's Law Dictionary to ascertain the common, ordinary meaning of the word "transmit" in construing W.

Va. Code 11-15-9 which exempted from sales tax purchases directly used to support the act of "transmission").

Rather than engage in endless debate about cherry-picked definitions, the Court must return to the heart of the matter – that the OTA had absolutely no authority or basis to extrapolate the Legislature's intent to limit the subject exemption to physical health and fitness. Simply because physical wellness is the most tangible aspect of fitness does not make it the sole aspect of fitness and health. Indeed, the word "health" is derived from the Anglican word "Hal" meaning whole or holy, closely linking "health" to spirituality in the mind-body-spirit balance.

Next, Appellee appears to argue that the statute's use of the term "health" in conjunction with "fitness" inherently serves to limit the meaning of the former to "physical" health since "fitness" can only mean "physical fitness." Appellee's Brief, at page 10. Such a contention is fallacious for reasons beyond the fact that the very rules of construction the Appellee cites recognize that use of the conjunctive "and" to separate words generally connotes two possibly related, but independent concepts. See, e.g., Wilcox v. Warren Const. Co., 95 Or. 125, 186 P. 13 (1919). In this case, an examination of their standard definitions show that the words "health" and "fitness" are so closely related that one could not operate to limit the meaning of the other.

Indeed, it is well recognized that, when used in the context of "health," "fitness" is a virtual synonym of the term "health," which, as the Appellant's Initial Brief demonstrates, unquestionably includes mental, physical and spiritual health and fitness. For example, attempting to define the term "fitness," the American Diabetes Association website has posted this recent excerpt:

> The Definition of Fitness
> January 10, 2007

> Do you know what it means to truly be fit? Maybe you think it means being free of disease and other health problems or having loads of energy, a muscular body or the ability to finish a marathon. Actually, fitness refers to your own optimal health and overall well-being. Fitness is your health at its very best.
> Being fit defines every aspect of your health — not just physically but also your emotional and mental well-being. In fact, they're interconnected. Smart eating and active living are instrumental to all three. Being fit gives you:
>
> Energy to be more productive and do things that are important to you.
>
> A positive outlook to handle the mental challenges and emotional ups and downs to deal with stress.
>
> Reduced risk for many health problems, including heart disease, cancer and diabetes.
>
> The opportunity to look and feel at your best.
>
> Physical strength and endurance to protect yourself in case of emergency.
>
> A better chance for a higher quality of life and perhaps and longer one, too.
>
> http://www.eatright.org/cps/rde/xchg/ada/hs.xsl/home_10702_ENU_HTML.htm.

Even though issued by an organization of technically proficient experts and professionals, the plain language definition above was posted with the obvious intent of communicating with the general public, i.e. to state what should be the common and accepted meaning of the term. Likewise, yet another definition from a general use dictionary discloses that "fitness" is quite literally a synonym for "health." See *Random House Unabridged Dictionary, © Random House, Inc. 2006.* (first definition of "fitness" is "1. health.").

Therefore, absent an express indication by the Legislature that the words "health and fitness" are to be given a meaning other than their natural, ordinary and commonly accepted meaning, that meaning must be applied. Miners in Gen. Group v. Hix, 123 W. Va. 637, 17 S.E.2d 810 (1941), syl. pt. 1.

Thus, widely-known and mutually consistent statements, defining the words of the phrase "health and fitness," show that they have a common and accepted meaning which does not impliedly limit them to *physical* health and fitness. In both declaring the words "health and

fitness" ambiguous and embracing the Appellee's regulation interpreting them, the OTA Decision was patently erroneous under the precedents of this Court, as was the Circuit Court's Final Order in sustaining the same.

III. INTERPRETIVE RULES DO NOT HAVE THE FORCE OF LAW AND ARE TO BE GIVEN NO DEFERENCE WHERE, AS HERE, THEY CONFLICT WITH OR ATTEMPT TO MODIFY THE PLAIN LANGUAGE OF THE GOVERNING STATUTE TO WHICH THEY RELATE.

In his Brief, the Appellee, makes the bold and unsupported statement that the interpretive regulations at issue here "rise to the force of law." Appellee's Brief, at page 17. To the contrary, as even the Circuit Court pointed out, interpretative rules "are not binding upon a reviewing court but serve only as a source of guidance." Order, at page 6. This Court has long held that interpretive rules are entitled to less deference than legislative rules. As this Court explained:

> Interpretive rules . . . do not create rights but merely clarify an existing statute or regulation. Because they only clarify existing law, interpretive rules need not go through the legislative authorization process. Although they are entitled to some deference from the courts, interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court. They are entitled on judicial review only to the weight that their inherent persuasiveness commands.

Family Med. Imaging v. W. Va. Healthcare Author, 218 W. Va. 146, 151, 624 S.E.2d 493, 498 (2005) (quoting Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995)).

As stated previously, any regulation purporting to interpret W. Va. Code. § 11-15-11 must either be read in harmony with it or give way to the governing statute and may not add to, subtract from or otherwise alter the statute's terms. Syncor International Corporation v. Commissioner, 208 W. Va. 658, 524 S.E.2d 479, syl. pt. 3 (2001). In fact, when a regulation is "...unduly restricted and in conflict with the legislative intent, the agency's interpretation is

inapplicable." Syncor, 208 W. Va. at 662, 542 S.E.2d at 483 (quoting Boley v. Miller, 187 W. Va. 242, 246, 418 S.E.2d 352,356 (1992)). To be clear, "[w]hen the agency's interpretation goes beyond that scope of whatever ambiguity the statute contains, no deference is due." Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 588, 466 S.E. 2d 424, 439 (1995).

Appellee finds it significant that the Legislature revisited H. B. 2041, 2003 W. Va. Acts Ch. 146 but made no changes to W. Va. Code §11-15-11. He essentially argues that during that review, the Legislature could have amended the subject statute and that its failure to do so must not only be seen as an endorsement of the interpretive regulation but giving it the "force of law." To the contrary, the Legislature was presumably aware of the legislative regulations related to the applicable statutes in the cases of both CNG Transmission v. Craig, 564 S.E.2d 167, 211 W.Va. 170 and Syncor International Corporation v. Commissioner, 208 W.Va. 658, 524 S.E.2d 479, syl. pt. 3 (2001), but took no action to override them with legislation before those regulations were successfully challenged before this Court.

By failing to recognize the limitation upon deference to a regulatory body when it attempts by interpretive regulation to modify the statute upon which it was based, the OTA Decision was based on an incorrect legal standard, and, for that reason, the Circuit Court's failure to overrule it was erroneous.

IV. DESPITE THE APPELLEE'S CONTENTIONS TO THE CONTRARY, EVEN THE CIRCUIT COURT RECOGNIZED THE IMPORTANT CONTRIBUTION THE APPELLANT'S PROGRAMS MAKE TO ENHANCE THE HEALTH AND FITNESS OF THE COMMUNITY IT SERVES.

In his Brief, the Appellee also makes much of the fact that the parties' stipulations did not expressly state the fact that the Appellant's programs contribute importantly to improving health and fitness. Appellant asserts that the record reflects that its programs did, indeed, contribute

importantly to improving the community. Even a cursory review of the stipulated facts, setting forth the numerous positive services provided to the community by the Appellant, necessarily culminates in the conclusion that the wide array of actions undertaken by the Appellant support and promote the "health and fitness" objects of the statute.

As pointed out by the Appellee himself, "[i]t is a fundamental principle of statutory construction that the meaning of a word cannot be determined in salutation, but it must be drawn from the context in which it is used." West Virginia Health Care Cost Review Auth. V. Boone Mem'l Hosp., 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996). Likewise, it is not the mere saying so which establishes the conclusion, that the Appellant's programs contribute to the health and fitness of the community, but the numerous actions, that the Appellee stipulated were undertaken as a part of those programs, which demonstrate that fact.

Certainly, the Circuit Court recognized as much in its Final Order, noting that:

> The Court would be remiss if it did not note the wonderful civic opportunities which the Apollo Civic Theatre provides to the members of the local community, including many children, our community's most important resource. The Court would further note the laudatory longstanding dedication and tremendous amount of work performed by so many volunteers, many of whom were in the courtroom for oral argument. These volunteers are our community's true heroes . . .

Final Order, at 16, n.4. (August 7, 2007).

Thus, aside from the meaning of "health and fitness," such an attempt in the Appellee's Brief, to provide a new justification for the error in Circuit Court's Order, based on the extent of public benefit from the Appellant's programs, is conclusively refuted by that very Order.

V. THE APPELLEE'S BRIEF ADOPTS THE CIRCUIT COURT'S ERROR IN FINDING THAT THE PARTIES' STIPULATION, PROVING THE RECREATIONAL ASPECTS OF THE APPELLANT'S PROGRAMS IN THIS CASE, WAS MOOT.

Like the Circuit Court, the Appellee in his Brief, incorrectly concludes that interpretation of the term "recreational" is moot because the Appellant did not prevail upon its interpretation of health and fitness. For many of the reasons contained in the stipulated facts of this case and in the litany of rules of construction cited by the Appellee, the agreement of the parties, that the Appellant's programs provided recreational opportunities for the public, is not moot in the sense of precluding the necessity of this Court's consideration of the same.

The facts stipulated by both parties clearly state that, except for the operation of a concession stand incidental to the performances it presents, the parties stipulated that the Appellant's revenue-producing operations were either "educational, charitable or provide[d] recreational opportunities to the public." See Joint Stip. Fact No. 8. Moreover, a review of all of the stipulated facts undoubtedly leads to the cumulative conclusion that the recreational activities provided by the Appellant support the "health and fitness" element in the statute. See Section IV, *infra*.

Beyond that, this Court has expressly addressed the standard for determining whether a particular issue is moot in West Virginia Education Association v. Consolidated Public Retirement Board, 194 W. Va. 501, 460 S.E.2d 747 (1995). Specifically, syllabus point 6 provides that:

> Even though an issue may be technically moot, it still may be deserving of judicial resolution by meeting one or more of the following criteria: First, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief. . . . Second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public. . . . Third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided. . . .

Id. at syl. pt. 6 (quoting Israel by Israel v. West Virginia Secondary Schools Activity Commission, 182 W. Va. 454, 457, 388 S.E.2d 480, 483 (1989)). The circumstances surrounding the Circuit Court's Order satisfy each of those requirements.

First, the financial hardship imposed upon the Appellant by the Circuit Court's Order will undoubtedly limit the number and quality of programs that it is able to present to the community in the future. Secondly, "[t]hat the issue is capable of repetition is self-evident" because it is virtually certain that Appellee will continue his misinterpretation of the legislative regulation at issue here. Israel by Israel , 182 W. Va. 454, 457, 388 S.E.2d 480, 483. Finally, given the extensive evidence of the Appellant's charitable and public service endeavors, it must be concluded that the public interest would be well served by its continuation in the community, which would be seriously jeopardized should the Circuit Court Order be affirmed.

It is the Circuit Court's failure to properly apply the statute as written that enabled it to delve into the analysis of the interpretative governing rule that impermissibly limits the term "health and fitness" to physical. That error was then compounded when it determined that the term "recreational" was, thus, moot and need not be addressed. As a result, in failing to address the OTA Decision's erroneous rejection of the parties' agreement about the recreational aspects of the Appellant's programs, the Circuit Court committed another reversible error – a conclusion which the Appellee's Brief makes no attempt to directly rebut.

VI. THE APPELLEE' BRIEF ADDS NOTHING TO OVERCOME THE CIRCUIT COURT'S ERROR IN FAILING TO RECOGNIZE THAT THE LANGUAGE OF THIS PARTICULAR TAX EXEMPTION STATUTE LITERALLY REQUIRES APPLICATION OF THE RULE OF LIBERAL CONSTRUCTION OF SOCIO-ECONOMIC LEGISLATION.

The consumers sales and service tax statute provides, in pertinent part,

> (a) The following sales of tangible personal property and services are exempt as provided in this subsection:. . .

(6) Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve of this chapter, which is exempt from federal income tax under Section 501(c)(3) or (4) of the Internal Revenue Code of 1986, as amended, and which is:

(C) A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees;

. . .

(F) For purposes of this subsection:
(i) The term 'support' includes, *but is not limited to:*
(I) Gifts, grants, contributions or membership fees;
(II) Gross receipts from fundraisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity that is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;
(III) Net income from an unrelated business activities, whether or not the activities are carried on regularly as a trade or business;
(IV) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;
(V) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of the organization; and
(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit;
(ii) The term 'charitable contribution' means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended; and
(iii) The term "membership fee" does not include any amounts paid for tangible personal property or specific services rendered to members by the corporation or organization; . . . W.Va. Code § 11-15-9 (Emphasis added).

Upon applying the foregoing statutory language to the evidence in the record of this matter, it is clear that more than half of the Appellant's annual support, during the years in question, represents subsidies, grants, gifts and/or direct or indirect charitable contributions given in order to enable it to accomplish its charitable purpose.

Specifically, during the years in question, the Appellant's total annual financial support ranged between $ 218,169 (representing Program Cash of $84,171, Non-program Cash of $25,856, Donated Services of $104,102 and Donated Property of $4,040, in 1999, and $289,075 (representing Program Cash of $109,465, Non-program Cash of $55,845, Donated Services of $109,700 and Donated Property of $14,065, in 2003.

During those same years, the Appellant's support in the form of subsidies, grants, gifts and direct and indirect charitable contributions ranged between $ 133,998 (representing Non-program Cash of $25,856, Donated Services of $104,102 and Donated Property of $4,040, in 1999 and $176,610 (representing Non-program Cash of $55,845, Donated Services of $109,700 and Donated Property of $14,065) in 2003.

During each of those same years, the percent of the former that the latter represented ranged from 61.4% (1999) to 61.1% (2003), and in each of those years the percent of the former that the latter represents exceeded fifty percent of the total support received.

As a result of the fact that, during the years in question, the Appellant received more than half of its support from a combination of subsidies, grants, gifts and direct and indirect charitable contributions for the purpose of accomplishing its charitable objectives, it was exempt from consumers sales and service tax on its purchases. W. Va. Code § 11-15-9(a)(6)(C). Thus, because exemptions that apply to the consumers sales and service tax also apply to the purchaser's use tax, the Appellant's purchases were exempt from use tax for those same reasons. W.Va. Code § 11-15A-3(a)(2).

In rejecting that conclusion, the Circuit Court erred in affirming the OTA Decision which found that the value of volunteered services and donated property cannot be included in the statutory measure, and thus, that the Appellant did not receive more than half of its support from

authorized sources. Before both OTA and the Circuit OTA, Appellant pointed out the fact that the quoted list of sources of "support," that can be counted to satisfy the statutory measure, is introduced by the phrase "includes, but is not limited to." An examination of well-settled authority reveals the significance attached to such a phrase as a part of the body of law of statutory construction.

Specifically, this Court has held that the Legislature's use of the term "including," when introducing a list of described items, reflects a clear intent that the list is illustrative of other items having similar characteristics as to which the subject rule, condition, etc. is also intended to be applicable. State Human Rights Commission v. Pauley, 158 W.Va. 495, 212 S.E.2d 77 (1975). The certainty of such an intent is all the greater when "including" is followed by "but not limited to." Id.

Instead of adopting Appellant's position, the Circuit Court found merit in the Appellee's argument that under subsection VI of W. Va. Code §11-15-9(a)(6)(F)(i), the governmental units referred to in IRS Code Section 170 represent a non-exclusive list of the governmental units that qualify. As a basis for such a conclusion, the Circuit Court again erroneously relies upon the deference it believes that it owes the Appellee's interpretative rules without even considering that only federal *income* tax laws preclude the deduction of donations of volunteer time to the Appellant for *income* tax purposes.

By its use in the subject sales tax law of certain portions of the Internal Revenue Code, the Legislature must be said to have expressly intended to incorporate by reference certain federal income tax rules (establishing general income tax exempt status of an organization), but, by its omission of any express reference to the portions of that same code on which the Appellee would rely (addressing the recognition as income and the deductibility of donated services) it

must also be said to have intentionally avoided the Appellee's point. See Phillips v. Larry's Drive in Pharmacy, Inc., 220 W. Va. 484, 490, 647, S.E.2d 290, 296 (2007) (utilizing the statutory interpretation maxim *expressio unius est exclusio alterus,* or the express mention of one thing implies the exclusion of another to find that pharmacy is not a "health care provider" entitled to rely upon the protections of the 1986 Medical Professional Liability Act).

Appellee's argument is raised in challenge to the Appellant's position about the particular significance of the Legislature's use of the phrase "includes, but is not limited to," in the context of the well-established rule of liberal construction for socio-economic legislation as it has been applied by this Court in cases involving state tax laws.

Appellee, instead, contends that all exemption statutes are to be strictly construed against taxpayers, and that, to justify a liberal construction of the statute to include donated services, the Appellant has cited inappropriate authority. Specifically, Appellee argues that Appellant's reliance upon State Human Rights Commission v. Pauley, 158 W.Va. 495, 212 S.E.2d 77 (1975) is misplaced. Instead, using a Rhode Island case decided *per curiam*, Appellee argues that tax exemption statutes are never remedial in nature. See Appellee's Brief, at page 21 (quoting Fleet Credit Corp. v Frazier, 726 A.2d 452, 455 (1999)).

Fleet involved whether a personal property tax exemption under its statutes for personal property owned by any corporation used for a school, academy, or seminary of learning" includes leased computer equipment that a nonprofit taxpayer has used exclusively for educational purposes. Id. Because that particular statute had been strictly construed against taxpayers in the past, the Court refused to accept the taxpayer's argument that the statute exempting for educational uses of property is, in reality, a rule of "nontaxability," rather than an exemption from taxation. Id. Fleet involved an entirely different type of tax with entirely

different circumstances, is in no way precedential in this case and should not be followed by this Court.

Appellee next contends that more on point is the recent case of Phillips v. Larry's Drive in Pharmacy, Inc., 220 W. Va. 484, 647, S.E.2d 290 (2007). Phillips involved whether a pharmacy is a "health care provider" entitled to rely upon the protections of the 1986 Medical Professional Liability Act [MPLA]. Id.

One must conclude that Appellant cites this case to support his theory that under subsection VI of W. Va. Code §11-15-9(a)(6)(F)(i), the governmental units referred to in IRS Code Section 170 represent an exclusive list of the governmental units that qualify. The Phillips Court found that pharmacies were not included, in part, based upon the statutory interpretation maxim *expressio unius est exclusio alterus,* or the express mention of one thing implies the exclusion of another. Id. at 490, 296.

Appellant conveniently fails to mention, however, that the central rationale for the holding in Phillips is that "the [MPLA] alters the "common law and statutory rights of our citizens to compensation for injury and death[.]" Id. at 928, 492 (quoting W. Va. Code §55-7B-1). As the Court explained, "[i]n other words, by its own terms, the entire MPLA is an act designed to be in derogation of the common law . . . It is a long-standing maxim that "[s]tatutes in derogation of the common law are strictly construed." Id. (internal quotations omitted). Thus, the Phillips case bears no relevance to the case at hand.

Specifically, the Court has previously recognized that, where the subject statute is in the nature of "socioeconomic legislation, it is to be liberally construed in favor of the taxpayer" to achieve the beneficial and remedial purposes it is intended to promote. See Andy Bros. Tire Co.

v. W. Va. State Tax Commissioner, 160 W.Va. 144, 233 S.E. 2d 134 (1977); Brockway Glass Co. v. Caryl, 183 W.Va. 122, 394 S.E. 2d 515 (1990).

Here, it is apparent that the subject exemption was enacted for the socio-economic reason that the Legislature intended to avoid imposing the burden of sales and use taxation on the purchases of typically cash-strapped charitable organizations such as the Appellant, and, thus, to encourage and support their good works.

Although the socio-economic legislation in Andy Bros. and Brockway Glass involved investment incentive tax credits, the reasoning of those cases is not limited to only such programs but, rather, extends to any type of legislation that provides tax relief for socioeconomic purposes. Here, by use of the inclusive phrase "includes, but is not limited to," in identifying the sources of support that would be counted in determining an organization's eligibility for the exemption, the Legislature virtually invited a liberal interpretation of the term "support." Thus, in light of the express language and obvious purpose of the exemption, it also clearly qualifies as socioeconomic legislation and as such, any ambiguities about its application should also be construed in favor of the Appellant.

Moreover, by using the terms "includes, but is not limited to" in W. Va. Code §11-15-9(a)(6)(F)(i), the Legislature clearly intended that the list of items that followed be viewed as one that is non-exclusive in nature and thus sets forth only examples of the types of items that could constitute support rather than an exhaustive list thereof. The Appellee has offered nothing to refute that obvious outcome.

Accordingly, the Circuit Court Order, affirming the OTA decision that deleted the value of donated services from the consideration of whether the Appellant satisfied the statutory measure for support, was in error. Therefore, as the stipulated evidence in the record

demonstrates, the Appellant did receive more than one half of its support from a combination of subsidies, grants, gifts and direct and indirect charitable contributions. Thus, it was entitled to the benefit of the exemption from use tax for its purchases and the Circuit Court's Order holding otherwise was clearly erroneous.

VII. APPELLEE'S BRIEF OFFERS NOTHING THAT MITIGATES THE CIRCUIT COURT'S ERROR IN EXCLUDING INTEREST INCOME THE APPELLANT RECEIVED FROM THE BURKHART ESTATE BEQUEST, AS BEING QUALIFIED SUPPORT FOR PURPOSES OF WEST VIRGINIA'S SALES AND USE TAX STATUTES, ON THE BASIS OF ITS UNAUTHORIZED RELIANCE ON EXTRANEOUS, FINANCIAL ACCOUNTING RULES HAVING NO FORCE AND EFFECT IN THE CONTEXT OF THOSE STATUTES.

In arguing that Appellant is not entitled to an exemption under W. Va. Code §11-15-9(a)(6)(C), Appellee would also rely upon Statement of Financial Accounting Standard No. 116, Accounting for Contributions Received and Contributions Made. However, the governing sales tax law neither references nor authorizes reliance upon Statements of Financial Accounting Standards, promulgated by the Financial Accounting Standards Board ("FASB"). Nor can such use be implied. In fact, while the Legislature expressly incorporated Generally Accepted Accounting Principles (GAAP) by reference into the franchise and income tax articles [W.Va Code §§ 11-23-1 et seq. and 11-24-1 et seq.], it omitted any reference to GAAP in the sales and use tax laws [W.Va. Code §§ 11-15-1 et seq., 11-15A-1 et seq. and 11-15B-1 et seq.].

In the only decision of this Court construing W. Va. Code §11-15-9(a)(6), it held that the term "grant" as used in that exemption means giving "something to accomplish a charitable purposes." Kings Daughters Housing, Inc. v. Paige, 203 W.Va. 74, 506 S.E. 2d 329 (1998) *per curiam*. This Court certainly could have relied upon standards issued by FASB to ascertain the meaning of the term. Rather, it chose to employ common and accepted rules of statutory construction to reach its conclusion. Thus, Appellee's reliance upon such FASB standards is misplaced not Appellant's reliance upon the King's Daughter's case.

Since holding the funds of the Burkhart Estate bequest in interest-bearing accounts, pending their expenditure for charitable purposes, was the inherent fiduciary duty of the Appellant, the obvious implication is that such interest was, along with the principal, something given "to accomplish a charitable purpose."

It is well established, that in applying statutes, incorporation by implied reference is not favored. See Section I, infra, citing authority for the proposition that the narrow rule of "necessary implication" is confined to filling in unstated procedural arrangements – not modifying substantive terms. Thus, the OTA Decision's and the Circuit Court Order's attempt to engraft FASB financial accounting rules on the terms of the governing statute are unauthorized.

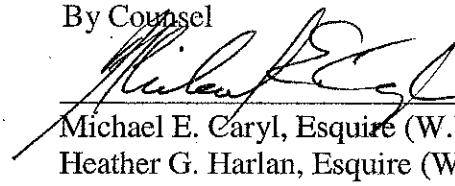
Thus, in affirming the OTA Decision which denied the inclusion of such conclusively proven interest in the Appellant's support on the basis of an incorrect legal standard, the Circuit Court Order was clearly erroneous. Again, the Appellee's Brief offers nothing to support the contrary conclusion.

CONCLUSION

Based on the stipulated evidence in the record of this matter, on the Appellant's Initial Brief, on the foregoing points and authorities, and on the relevant statutory and case law all in support thereof, it is respectfully submitted that the OTA Decision should have been set aside in its entirety, and the Circuit Court's Order affirming the OTA Decision is erroneous and should be reversed, overruled and set aside in its entirety.

Respectfully submitted,

APOLLO CIVIC THEATRE, INC., Appellant
By Counsel



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CERTIFICATE OF SERVICE

I, Michael E. Caryl, Esquire, do hereby certify that true and exact copies of the foregoing Appellant's Reply Brief has been served, by United States mail, postage prepaid, upon the following Appellee's Counsel:

Scott E. Johnson, Esquire
Assistant Attorney General
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Building 1, Room W-435
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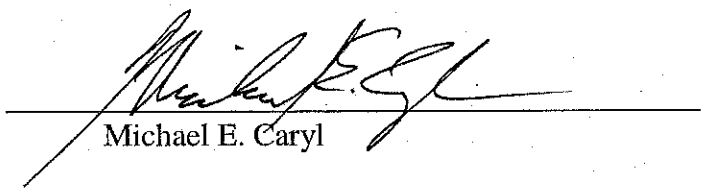
this 24th day of June, 2008.



Michael E. Caryl